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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. ~~811~~ 80

THOMAS HODGE, GEORGE HODGE, NETTIE POWELL, ANNA LEASE AND AGNES CRIPPEN,
Petitioners,

vs.

FIRST PRESBYTERIAN CHURCH OF STERLING, ILLINOIS

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IOWA AND BRIEF IN SUPPORT THEREOF.

J. J. LUDENS,
Counsel for Petitioners.

INDEX

Subject Index

Index to Cases Cited

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 811

THOMAS HODGE, GEORGE HODGE, NETTIE POWELL, ANNA LEASE AND AGNES CRIPPEN,
Petitioners,

vs.

FIRST PRESBYTERIAN CHURCH OF STERLING, ILLINOIS

PETITION FOR WRIT OF CERTIORARI TO REVIEW A DECISION OF THE SUPREME COURT OF THE STATE OF IOWA.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Thomas Hodge, George Hodge, Nettie Powell, Anna Lease and Agnes Crippen, hereby petition this Honorable Court that a writ of certiorari issue to review a judgment and decision of the Supreme Court of the State of Iowa which reversed a judgment of the District Court of Tama County, Iowa, and which ordered the District Court to admit to probate a document purporting to be the last will and testament of Mary E. Barrie.

Opinion Below

The opinion of the Supreme Court of Iowa (R. 31) is reported as *In re Barrie's Estate,* Iowa, 35 N. W. 2d, 658.

Jurisdiction

The opinion of the Supreme Court of Iowa was rendered January 11, 1949. A timely application for rehearing was made and was denied by the Supreme Court March 11, 1949, and final judgment was thereupon entered. The jurisdiction of this Court is invoked under Section 1257 (3) Title 28 United States Code. (Also Sec. 344, Par. B, U. S. Code, 1946 Ed.)

Questions Presented

1. Whether under the full faith and credit clause of the Constitution of the United States (Article 4, Section 1) the judgment of a court of last resort of the State of Illinois, denying probate to the purported will of a decedent, who died domiciled in Illinois, upon the ground that the will had been revoked, so that the decedent died intestate, is conclusive and binding upon the courts of the State of Iowa in an action brought in Iowa, by the same parties, to probate the same purported will in respect of real estate owned by the decedent and located in Iowa.

2. Whether under the full faith and credit clause of the Constitution of the United States the judgment of a court of last resort in the state of a decedent's domicile, that the decedent died intestate, is conclusive and controlling upon the courts of all other states.

3. Whether the Supreme Court of Iowa committed error by holding that the judgment of the court of last resort of the state of the decedent's domicile that the deceased died intestate, is not *res judicata* in an action between the same parties and involving the same question in the courts of another state.

4. Whether the judgment of the Supreme Court of Illinois, the domicile of the deceased, is controlling upon all other courts upon the question whether the deceased died testate or intestate.

Summary Statement of Matters Involved

Mary E. Barrie died December 16, 1944, domiciled at and a resident of the City of Sterling, Whiteside County, Illinois, where she owned real and personal property. About 1928 she had executed an instrument which at one time she intended as her will, but after her death the instrument was found in a mutilated condition indicating that it had been revoked.

The First Presbyterian Church of Sterling, Illinois and others who were named as legatees in said instrument, filed a petition in the Probate Court of Whiteside County, Illinois, to admit said instrument to probate. The petitioners herein, being the sole heirs of Mary E. Barrie, filed objections and upon a hearing the Probate Court of Whiteside County, Illinois admitted the instrument to probate. The petitioners herein appealed to the Circuit Court of Whiteside County, Illinois, which court affirmed the decision of the Probate Court, but on appeal to the Supreme Court of Illinois, it was decided by said court that the instrument had been revoked during the lifetime of Mary E. Barrie, and the Supreme Court ordered the Probate Court of Whiteside County, Illinois to refuse it to probate. A petition for rehearing was filed and denied on March 18, 1946 and the said judgment was final, being by the court of last resort in Illinois. This decision is reported under the title, "In re Barrie Estate," in 393 Illinois, page 111.

The Probate Court of Whiteside County, Illinois, following the mandate of the Supreme Court of Illinois, entered an order denying said instrument to probate. The property both real and personal of Mary E. Barrie situated

in the State of Illinois was administered as intestate property.

The decedent, in addition to the property owned in Whiteside County, Illinois, owned a farm of about 160 acres in Tama County, Iowa. After the judgment and orders above mentioned as reported in 393 Ill. pg. 111, and the order of the Probate Court of Whiteside County were entered, the said First Presbyterian Church of Sterling, Illinois, which was one of the petitioners to have the instrument admitted to probate in Illinois, on the 19th day of July, 1946, filed a petition in the District Court of Tama County, Iowa, where the land of said Mary E. Barrie was situated, asking that said instrument be admitted to probate as a will in the State of Iowa.

The petitioners herein, on December 2, 1946, filed objections to the petition to probate said instrument in the District Court of Tama County, Iowa, (R. 3), which objections stated the proceedings in the State of Illinois and the results of said proceedings in the courts of Illinois; that the proceedings in Iowa were between the same parties as in Illinois; that the judgments of the Supreme Court of Illinois and the Probate Court of Whiteside County were in full force and effect and under the Constitution of the United States, were entitled to full faith and credit in the courts of Iowa; that said alleged instrument had not been admitted to probate in any court of competent jurisdiction. Your petitioners herein also filed copies of the decision and judgment of the Supreme Court of Illinois and judgment and order of the Probate Court of Whiteside County, Illinois, duly authenticated according to the act of Congress (Sec. 687, U. S. Code, 1946 ed.).

Upon a hearing before the District Court of Tama County, Iowa, the objections were sustained and the instrument was denied probate, whereupon the First Presbyterian Church of Sterling, Illinois took an appeal to the

Supreme Court of Iowa, which court reversed the judgment of the District Court and ordered the District Court to admit said instrument to probate. The Supreme Court of Iowa held, four of the nine judges dissenting, that the Illinois judgment holding that the decedent had died intestate was not conclusive or *res judicata* as to probate proceedings in Iowa.

Reasons Relied upon for Allowance of Writ

1. That the Supreme Court of Iowa has erroneously decided a Federal question of substance not heretofore determined by this Court, by holding that under the full faith and credit clause of the Constitution of the United States (Article 4, Section 1) the judgment of a court of last resort of the State of Illinois, denying probate to the purported will of a decedent who died domiciled in Illinois, upon the ground that the will had been revoked, so that the decedent died intestate, is not conclusive and binding upon the courts of the State of Iowa, in an action in Iowa by and between the same parties, to probate the same purported will, in respect of real estate owned by the decedent and located in Iowa.

2. That the Supreme Court of Iowa has erroneously decided a Federal question of substance not heretofore determined by this Court, by holding that under the full faith and credit clause of the Constitution of the United States the judgment of a court of last resort of the state of a decedent's domicile, that the decedent died intestate, is not conclusive and controlling upon the courts of all other states.

3. That the Supreme Court of Iowa has erroneously decided a Federal question of substance not heretofore determined by this Court, by holding that the judgment of the court of last resort of the state of the decedent's

domicile, that the deceased died intestate, is not *res judicata* in an action between the same parties and involving the same question in the courts of another state.

Prayer for Relief

WHEREFORE, Petitioners pray that a writ of certiorari issue out of and under the seal of this Court, which writ shall command the said Supreme Court of Iowa to certify and send to this Court a full and complete transcript of the record of proceedings in said court, including a transcript of the proceedings on appeal to the Supreme Court of Iowa; said proceedings in the Supreme Court being numbered and entitled "Supreme Court Docket No. 10,146, in re Estate of Mary E. Barrie, Deceased; First Presbyterian Church of Sterling, Illinois, et al., Appellees, vs. Thomas Hodge, et al., Appellants" to the end that this case may be reviewed and determined by this Court as provided by the Statutes of the United States; and the judgment and decision of the Supreme Court of Iowa in the case be reversed by this Court, and the Petitioners given such other relief as to this Court may seem proper.

Respectfully,

J. J. LUDENS,
311 Lawrence Building,
Sterling, Illinois,
Attorney for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Statement of Case

The facts, the jurisdiction of this Court, the reasons relied upon for the allowance of the writ, and the statutes and the matters involved have been sufficiently described in the petition so that they will not be repeated here.

Specifications of Errors to Be Urged

The Supreme Court of Iowa erred:

1. In reversing the judgment of the District Court of Tama County, Iowa.

2. In ordering that the purported will of Mary E. Barrie be admitted to probate.

3. In holding that under the full faith and credit clause of the Constitution of the United States the judgment of a Court of last resort of the State of Illinois denying probate to the purported will of a decedent who died domiciled in Illinois, upon the ground that the will had been revoked so that the decedent died intestate, is not conclusive and binding upon the Courts of the State of Iowa, in an action in Iowa by and between the same parties to probate the same purported will, in respect of real estate owned by the decedent and located in Iowa.

4. In holding that under the full faith and credit clause of the Constitution of the United States the judgment of a Court of last resort of the State of a decedent's domicile, that the decedent died intestate, is not conclusive and controlling upon the Courts of all other States.

5. In holding that the judgment of the court of last resort of the decedent's domicile that the deceased died intestate, is not *res judicata* in an action between the same parties

and involving the same question in the courts of another State.

Summary of Argument

Whether or not a decedent died testate or intestate is determined according to the law of the decedent's domicile.

When this question has been answered by the court of last resort of the State of the decedent's domicile, that determination, under the full faith and credit clause of the Constitution, is *res judicata* and conclusive upon all other courts.

ARGUMENT

I

The law of the domicile governs as to whether or not a person died testate or intestate.

As to the effect of refusal to probate in Illinois, the Supreme Court of Illinois, in the case of *Davis* v. *Upson*, 230 Ill. 327, says as follows:

> "If the decision of the court of the domicile of a deceased person does not control in the matter of whether the deceased died testate or intestate there must necessarily result a multitude of decisions upon that question, and if a devisee may carry a will from State to State and present it for probate in each State where the decedent had a debt due him at the time of his death, until he can find a State under the laws of which it can be admitted to probate, great confusion in the settlement of estates would follow."

In the case of *Gailey* v. *Brown*, 169 Wis. 444, 171 N.W. 945, the facts were as follows: A resident of Illinois owned real estate in the State of Wisconsin. He executed a will in conformity with the laws of Illinois and after making the will, married. Under the laws of Illinois, marriage revokes a will. The court of Illinois decided that the will was

therefore revoked. Some of the heirs attempted to probate the will in the State of Wisconsin where the testator owned land but the court of Wisconsin refused to admit the will to probate, and said:

> "The determination of these questions legally and necessarily includes the inquiries by such foreign courts whether or not testator made a valid will and, if so, whether it had been legally revoked before his death; and such judgment of the courts in sister states is to be accepted here as fixing the status of the instrument propounded as a will and under these statutes has the same effect as if the original proceeding had been in the court of this state. It is considered that it results from this statutory modification of the common law that the question whether or not a purported will has been revoked is necessarily an inquiry in such foreign probate proceeding and is committed to the court of testator's domicile for determination under the law of his residence. It must therefore follow that the law of Illinois concerning the revocation of wills controls in the instant case."

In Page on *Wills*, Sec. 572, the law is set forth as follows:

> "It is a well established principle of law applicable to wills that the jurisdiction to admit to probate a will of decedent depends upon his domicile at the time of his death. The theory of many states in which common law is enforced is that the state within whose territorial limits the testator was domiciled at the time of his death may admit his will to probate even though the will was made in another state. It is universally held by all courts that the will should first be admitted for probate at the domicile of the testator."

In Story on *Conflict of Laws*, 7th Ed., Sec. 479g, it states as follows:

> "Another question may also be propounded. Suppose at the time of the making of a will or testament,

> the testator is domiciled in the place where it is made, and he afterwards removes to another place where he is domiciled at his death; does such removal change the rule of construction so that if there is a difference between the law of the original domicile and that of the new domicile, as to the interpretation of the terms, the law of the new domicile is to prevail? or, does the interpretation remain as it was by the law of the original domicile? This question does not seem to have undergone any absolute and positive decision in the courts acting under the common law. (It has been held, however, in such case, that unless the will was executed according to the law of the person's last domicile, and the place of his death, it would not be valid, although made according to the laws of the testator's domicile at the time it was made.")

In Story on *Conflict of Laws,* 7th Ed., Sec. 491c, it was held that whether a deceased person died intestate or not must be determined by the law of the place where he was domiciled at the time of his death.

In the case of *Rackemann* v. *Taylor,* 204 Mass. 394, 90 N.E. 552, the court said:

> "If he has property in another state or country, it may be necessary to prove the will or to take out administration there, either for the purpose of obtaining and collecting the property, or for the security of local creditors or the protection of rights of the state to receive taxes, or of residents of the state who ought to get what they are entitled to receive from the estate, without being obliged to follow the property into another jurisdiction. But such probate of a will or such administration of an intestate estate is always merely ancillary. It is not for the purpose of establishing rights of succession, whether under a will or otherwise. Those are to be established in the courts of the state or country where the deceased person had his domicile. The strictly ancillary character of such proceedings

has been recognized by many decisions of the courts of our own state, as well as of courts elsewhere."

In the case of *Patterson* v. *Dickinson*, 193 Fed. 328, the court said:

> "The superior court of Los Angeles county was not vested with jurisdiction primarily to decide whether the instrument which had been admitted to probate in Missouri as the will of Rachael E. Dickinson was what it purported to be. The determination of that question belonged exclusively to the probate court of the decedent's domicile. That court having finally adjudicated the question, and having decreed that the instrument was not the last will and testament of the decedent, and that she died intestate, its judgment must be held to be final and conclusive upon any ancillary administration. The will having been set aside by the only court which had jurisdiction to set it aside, the judgment so rendered is by law conclusive of the right of the distributee under the proceedings of the court of ancillary administration to retain the property obtained by virtue thereof."

The law is again set forth in Redfield on *Wills*, 4th Ed., Vol. 1, pages 403, 406 and 410, as follows:

> "It is well settled by the authorities that the law of the domicile governs as to whether a person died testate or intestate. All questions of testacy or intestacy belong to the judge of the domicile. It is the right and duty of that judge to constitute the personal representative of the deceased. To the court of the domicile belongs the interpretation and construction of the will of the testator, to determine who are the next of kin or heirs."

The case of *Re Randall Estate*, 113 Pac. 2nd Ed. 54, was a Washington case where an attempt was made to probate a will which had been refused probate in the State of Idaho.

The Idaho Court had declared the will invalid and refused to admit it to probate. In that case the Court said:

> "Thus it has been finally and conclusively established by the courts of her domicile that Mary Elizabeth Randall died intestate. Further, generally speaking, it is held in this group of cases that courts of ancillary jurisdiction are bound by comity or the due faith and credit clause of the Federal Constitution to accept the adjudication of courts or domiciliary jurisdiction upon the validity or invalidity of wills."

II

Under the full faith and credit clause of the Constitution of the United States, the proceedings and judgment of the State of Illinois are res judicata and conclusive upon all other courts.

Section 1, Article 4 of the Constitution of the United States provides that full faith and credit should be given in each state to the public acts, records and proceedings of every other state.

In the case of *Tilt* v. *Kelsey*, 207 U. S. 43, 28 Sup. Ct. Rep. pg. 1, on the question of full faith and credit that is given to judicial proceedings in the Probate Courts of a state, where a person died and the Probate Courts of New Jersey administered his estate, there was a serious question at the time as to where he was domiciled, but the Probate Court of New Jersey assumed jurisdiction and settled the entire estate, including inheritance taxes. Sometime later the courts of New York where part of his estate was located, assumed jurisdiction and proceeded to levy an inheritance tax upon the property situated in the State of New York.

The Court of Appeals, the highest court in New York, affirmed the decision of the lower courts holding that the courts of New York had a right to assess inheritance tax against the property located in New York, notwithstanding the decision of the court of New Jersey.

An appeal was taken to the Supreme Court of the United States on the ground that it violated the constitutional provision of the full faith and credit to the judicial proceedings of other states, and the Supreme Court of the United States, in disposing of the case said that such provision was enacted to carry into effect the constitutional provision providing that they should have, in any court within the United States, such faith and credit as they have by law or usage in the courts in the state from which they are taken. They have no greater or less or other effect in other courts than in those of their own state. The Supreme Court decided that because the courts of New York did not respect the decision of the courts of New Jersey, their decision was wrong and they reversed the decision of the New York court.

This law is also well stated in the case of *Southern Pacific Railroad Co.* v. *United States,* 168 U. S. page 1, where the court said:

> "The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by a settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property if, as between parties and their privies, conclusiveness did not attend the judgments of such

tribunals in respect of all matters properly put in issue, and actually determined by them."

In the case of *Magnolia Petroleum Co.* v. *Hunt*, 320 U. S. page 430, the court held:

"Under the full faith and credit clause and the act of Congress implementing it, what has been adjudicated in one state is res judicata to the same extent in every other state.

The Supreme Court is the final arbiter of the extent of exceptions to the full faith and credit clause and the act of Congress implementing it.

No considerations of local policy or law can impair the force and effect that the full faith and credit clause and the Act of Congress implementing it require to be given to a money judgment rendered in a civil suit outside the state of its rendition.

The purpose of the full faith and credit clause was to establish throughout the federal system the salutary principle of the common law, that a litigation once pursued to judgment shall be as conclusive of the rights of the parties in every other court as in that where the judgment was rendered, so that a cause of action merged in a judgment in one state is likewise merged in every other state.

Under the full faith and credit clause, a defendant may not a second time challenge the validity of the plaintiff's right which has ripened into a judgment, and a plaintiff may not for his single cause of action secure a second or a greater recovery.

The full faith and credit clause altered the status of the several states as independent foreign sovereignties each free to ignore rights and obligations created under the laws or established by the judicial proceedings of the others, by making each an integral part of a single nation in which rights judicially established in any part are given nation-wide application."

III

The Doctrine of Res Judicata

The doctrine of *res judicata* precludes these parties from litigating the same matter in the State of Iowa which was adjudicated in the courts of Illinois for the reasons set forth in Section II of this argument.

> "The judgment or decree of a court of competent jurisdiction upon the merits concludes the parties and privies to the litigation and constitutes a bar to a new action or suit involving the same cause of action either before the same or any other tribunal. Any right, fact, or matter in issue, and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose or subject matter of the two suits is the same or not."
>
> 34 *Corpus Juris*, page 743.

> "The doctrine of res judicata rests on the two maxims that 'a man should not be twice vexed for the same cause,' and that 'it is for the public good that there be an end to litigation.' The very object of instituting courts of justice is that litigation should be decided, and decided finally. That has been felt by all jurists. It is long since a reason has been assigned why judgments should be considered final, and should not be ripped up again. Human life is not long enough to allow of matters once disposed of being brought under discussion again; and for this reason it has always been considered a fundamental rule that when a matter has once become res judicata, there shall be an end to the question. A party whose interests are placed in jeopardy by a trial has a right to judicial immunity

from the consequences of further trials involving the same issues."

Freeman on *Judgments*, 5th Ed., Sec. 626.

"A decree denying probate to an instrument offered for that purpose, if on the merits, is conclusive of all the facts necessary to support it, and would ordinarily bar a second attempt to probate the same instrument."

Freeman on *Judgments*, 5th Ed., Sec. 815.

"But it is now settled that judgments rendered by courts of sister states are entitled to the same recognition accorded to judgments of domestic courts; and that they are entitled to the same faith and credit in every state as in the state where rendered so that they are or are not valid and conclusive in other states accordingly as they are or are not in the state of their rendition. The obligation to accord full faith and credit to a valid judgment, other than for lack of jurisdiction of the person or subject matter, or for the enforcement of a penalty, is without limitation. Furthermore, courts should not determine what part of a judgment of a court of another state should be effective and what part not, as if such judgment is regular on the face of the record it must be given effect in all its terms. Also the constitutional statutory provisions referred to protect a judgment of a court of a sister state against collateral impeachment."

34 *Corpus Juris*, pages 1125-1127.

"This doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts to the end that rights once established by the final judgment of a court of competent jurisdiction shall be recognized by those who are bound by it in every way, wherever the judgment is entitled to respect."

Hart Steel Co. v. *Railroad Supply Co.*, 244 U. S. 294.

This is not a case in which the question of the construction of a will is left to the court in which the land lies. That is an entirely different question. We agree that if there is a will and the land lies in another state from that of the domicile of the testator, the state in which the land lies can decide how the will applies to that land, but before that rule can be invoked, there must be a will in the state of the domicile.

If an instrument is a will, it is either a domestic or a foreign will. This instrument cannot be a foreign will in the State of Iowa because it is not a will in the State of Illinois, the state from which it came. Therefore, it is not a will at all. The courts of Illinois decided that this instrument was not a will and therefore the person died intestate.

Conclusion

We urge this Court to grant the writ for the following reasons:

1. The decision of the Supreme Court of Iowa is in conflict with the decisions of practically all other states in the Union and will cause great confusion in the law of wills by allowing this decision to stand.

2. Petitioners herein have been denied substantial constitutional and federal rights by the decision of the Supreme Court of Iowa.

Respectfully submitted,

J. J. LUDENS,
311 Lawrence Bldg.,
Sterling, Ill.,
Attorney for Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. ~~811~~ 80

THOMAS HODGE, GEORGE HODGE, NETTIE POWELL, ANNA LEASE AND AGNES CRIPPEN,
Petitioners,

vs.

FIRST PRESBYTERIAN CHURCH OF STERLING, ILLINOIS,
Respondent.

BRIEF OF RESPONDENT IN ANSWER TO PETITION FOR WRIT OF CERTIORARI.

CARL E. SHELDON,
PHILIP H. WARD,
Sterling, Illinois,
WILLARD F. RUSSELL,
Toledo, Iowa,
Counsel for Respondent.

THE DUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

SUBJECT INDEX.

Table of Cases Cited.

TEXTS CITED.

STATUTE CITED.

Supreme Court of the United States

OCTOBER TERM, 1948.

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FIRST PRESBYTERIAN CHURCH OF STERLING, ILLINOIS,

Respondent.

BRIEF OF RESPONDENT IN ANSWER TO PETITION FOR WRIT OF CERTIORARI.

OPINION BELOW.

The opinion of the Supreme Court of Iowa (R. 31) is reported as *In Re Barrie's Estate*, Iowa, 35 N. W. 2d 658.

STATEMENT OF CASE.

We adopt the petitioners' statement of the case but must add thereto the following:

The Iowa Code of 1946 Sec. 604.3 provides that the District Court of each County in Iowa shall have original and exclusive jurisdiction to probate the Wills of non-residents

of the State who have died leaving property within the State subject to administration; and that subsequent to the denial of probate of the Will of Mary E. Barrie by the Supreme Court of Illinois, the Appellate Court of the Second Appellate District of Illinois held that it was permissible to remove the original Will from the files of the Probate Court of Illinois "for the purpose" of presenting to the Iowa Court for probate. This is reported *In re Estate of Mary Barrie,* 311 Ill. App. 443, 73 N. E. 2d 654 (R. 18).

SUMMARY OF THE ARGUMENT.

In answering the arguments contained in the supporting brief, we propose to show that:

(1) The full faith and credit clause of the United States Constitution is not involved inasmuch as

a. The Illinois Supreme Court did not attempt to pass upon and had no jurisdiction to pass upon the question of whether the acts of the testator which amounted to a revocation in Illinois also constituted a revocation of the Will in Iowa which has a much different statute.

b. The full faith and credit clause only requires a sister State to give such force and effect to a decision as the Court of the first State gave to it.

c. If the full faith and credit clause were to be considered applicable to the decision as to the effect of the acts constituting revocation in Illinois, it would follow that full faith and credit should be given to the decision of the Appellate Court (R. 18) that it was proper to remove the original Will from the Court files of Illinois for the purpose of presenting the Will for probate in the State of Iowa.

(2) The doctrine of *res judicata* does not apply because the question before the Iowa Supreme Court (R. 31) was not that passed upon by the Illinois Supreme Court (R. 6) inasmuch as the question passed upon by the Iowa Court was whether the action of the testator constituted a revocation in Iowa within the terms of the Iowa Code. The Illinois Supreme Court only passed upon the effect of the acts of the testator as amounting to a revocation in Illinois under the Illinois statute.

(3) The Federal questions passed upon by the Iowa

Supreme Court were not in any sense new in principle and were decided in conformity with principles frequently enunciated by this Court, one of which is that the construction of a State statute will be left to the Supreme Court of that State, and another is that a judgment of a State Court is entitled to only such full faith and credit in other States as it has by the law and usage of the State in which it was rendered.

ARGUMENT.

I.

The Law of the Situs of the Property Governs as to Whether or Not a Person Died Testate or Intestate Insofar as Real Estate Is Concerned.

It is well settled that the validity and effect of a Will which passes title to an interest in land is determined by the law of the State where the land is. (Restatement of the Law, Conflict of Laws, Sec. 249) and that "The effectiveness of an intended revocation of a Will of an interest in land is determined by the law of the State where the land is." (Restatement of the Law, Conflict of Laws, Sec. 250.)

A fundamental principle of jurisprudence as deduced from English common law is that title to land passes only by the *lex re sitae*. *Darby* v. *Mayer*, 10 Wheat. 465, 6 L. Ed. 367; *McCormick* v. *Sullivant*, 10 Wheat. 192, 6 L. Ed. 300; *Robertson* v. *Pickrell*, 109 U. S. 608, 3 Sup. Ct. 407, 27 L. Ed. 1049; *Vogel* v. *New York Life Insurance Company*, 55 F. (2d) 205, writ of certiorari denied in 1932; 287 U. S. 604, 77 L. Ed. 525, 53 Sup. Ct. 9.

In commenting on these and numerous other cases, 131 A. L. R. Page 1026 states:

> "Subject to statutory provision to the contrary, expressed or by construction and a few cases to the contrary, some of which are explainable on statutory grounds, it may be stated generally that the great weight of authority favors the rule that a judgment or decree of a Court of decedent's domicile passing (expressly or by implication from admission to probate) upon the validity or construction of his Will, devising real property in another state, is not conclusive as to

> the question, so far as it concerns such real property in the courts of the other state, either upon parties or nonparties to the proceedings in which the judgment of the former state is rendered, whether considered under the full faith and credit provision or the doctrine of *res adjudicata* or estoppel by judgment or upon general grounds as to conclusiveness of judgments."

In the present instance, the Courts of Illinois *In Re Will of Mary E. Barrie,* 311 Ill. App. 443, 447; 73 N. E. 2d 654 (R. 18) in considering the question of whether or not the Will should be withdrawn from the Courts in Illinois for the purpose of admitting the same to probate in Iowa gave the following interpretation as to the effect of the Illinois decision denying probate of the Will in Illinois. "The title to and disposition of real estate either by deed or will is governed by the law of the State where the land is situated. Mary E. Barrie owned real estate located in Iowa, and the disposition of this real estate is governed by the laws of that State. Any order denying that will admission to probate in Illinois does not effect the title of her real estate located in the other state." The Iowa Supreme Court did not act contrary to this statement.

Let us now consider the authorities submitted by petitioner in his supporting brief as opposing the above well established principles. It is first noted that the case of *Davis* v. *Upson,* 230 Ill. 327, 82 N. E. Rep. 824 (Br. p. 8) is not in point in the present case as that case emphasizes that there was no land or other real estate located in the State of Illinois upon which to predicate jurisdiction of the Illinois Courts to admit the Will to probate. In this regard, the true status of the Illinois law on the question involved in our case is shown by the opinion in *Sterenberg, et al.* v. *St. Louis Union Trust Company,* 394 Ill. 452, 68 N. E. 2d 892, in which case, it appears that decedent died domiciled in the State of Missouri where his Will was admitted to

probate. It was held by the Illinois Court that the proceeding admitting the Will to probate in Missouri was invalid insofar as the real property in Illinois was concerned due to the fact that the Will had been revoked by the marriage of the testator subsequent to the execution of the Will. Note the statement in this case in 68 N. E. 2d on Page 895 as follows:

"The rule is established in this State and, we believe, in all States that the validity and construction, as well as the force and effect of all instruments affecting the title to land depend upon the laws of the State or Country where the land is situated." Iowa has recognized this rule so well stated by the Illinois Supreme Court.

The case of *Gailey* v. *Brown*, 169 Wis. 444, 171 N. W. 945, cited in petitioner's brief (Br. p. 8) has no bearing upon the present case as that was strictly a case of interpretation of a Wisconsin statute which is in no way involved in the Barrie case.

The case of *Rackemann* v. *Taylor*, 204 Mass. 394, 90 N. E. 552, (Br. p. 10) involved personal property only so is not applicable to the present case and furthermore in that case the Court did not hold that the Massachusetts Court which was not the court of domicile did not have power to first probate the Will, but simply held that as a matter of discretion, it would be well in regard to all of the considerations affecting the rights and interests of the parties to deny the probate at that time. It did, however, leave the way open for probate of the Will in question at a later date if conditions should warrant it. The cases of *Patterson* v. *Dickinson*, 193 Fed. 328 (Br. p. 11) and *In Re Randall Estate*, 113 Pac. (2d Ed.) 54, (Br. p. 11) are not applicable to the present case because they involve situations where the Will was admitted in a State other than the domicile upon presentation of an authenticated copy of the probate

in the domicillary estate, and then at a later date, the court of domicile overruled the original probate in that state, so naturally all proceedings based upon that original probate, by authenticated copy or otherwise, failed. This clearly is an entirely different question than is involved in this Barrie case.

We submit to the Court that Page on Wills, Sec. 572, (Br. p. 9) has been so seriously misquoted in petitioners' brief that it is necessary to correctly cite the paragraph to which the petitioner apparently had reference which is as follows:

> "As between different states or nations, jurisdiction to admit to probate the will of a decedent depends upon his domicile at the time of his death or upon the location of his property at that time, or both. The theory of many states in which common law is in force is that the state within whose territorial limits the testator was domiciled at the time of his death may admit his will to probate, even though the will was made in another state or testator was domiciled in such other state when the will was there made or testator dies in some other state. It has been said that as a rule, the will should first be submitted for probate at the domicile of the testator."

We hardly feel it necessary to point out to the Court that the omission of the words "or upon the location of his property at that time, or both" from the first sentence seriously impairs the meaning of the citation and also that it was entirely incorrect to state that this citation said "It is universally held by all Courts that the will should first be admitted for probate at the domicile of the testator."

The citations in Story on Conflict of Law, 7th Edition, (Br. pp. 9-10) as given by petitioner in his brief are inapplicable because those discussions are restricted to Wills of personal estate. The majority opinion of the Supreme Court of Iowa, not disagreed with by the minority opinion,

correctly quotes the stand of Story Conflicts of Law, 8th Edition, in regard to this doctrine when it quotes from Page 652 in Story, the following with relation to real immovable property:

> "The doctrine is clearly established at the common law that the law of the place where the property (speaking of real [immovable] property) is located is to govern as to capacity or incapacity of the testator, the forms and the solemnities to give the will or testament its due attestation and effect." (R. 33.)

Petitioner's references to Redfield on Wills, 4th Ed., Vol. 1, Pages 403, 406, 410 (Br. p. 11) is particularly inept in that it is not a quotation but a summary of that part of Redfield's discussion on foreign Wills which pertains to Wills regarding personal property. We call the Court's attention to the following direct citations from Redfield on Wills, 4th Ed., Vol 1, page 398:

> "It is scarcely necessary to state, that in regard to real property, the mode of execution, the construction, and the validity of a will must be governed, exclusively by *lex re sitae.*
>
> The descent of real estate, as well as the devise of it, is governed exclusively by the law of the place where the property is situated. It would not comport with the dignity, the independence, or the security of any independent state or nation, that these incidents should be liable to be affected, in any manner, by the legislation, or the decisions of the courts, of any state or nation besides itself. This has been a universally recognized rule of the English law from the earliest time, and is so unquestionable, that we would scarcely feel justified in occupying much space or reviewing the cases."

See also the further statement in Redfield on Page 409, 4th Ed., Vol. 1:

> "And the decision of the courts or the place of domicile of the testator, as to the validity, or revocation, of

a will personalty, are held conclusive upon all other courts, but not so as to realty, not within that jurisdiction."

It should be clear from the foregoing citations that all of the text books cited in petitioner's brief actually support the proposition that the law of the situs and not the law of the domicile governs as to real property outside of the state of domicile.

II.

The Full Faith and Credit Provision of the Constitution of the United States Is Not Violated in Any Manner by the Decision In Re Mary E. Barrie Estate.

The question of the application of the full faith and credit provision in a situation such as is involved in this case is clearly considered in 131 A. L. R. 1003 which states "although there is some authority to the contrary, the weight of authority holds that the full faith and credit provision does not render foreign decrees of probate conclusive as to the validity of a Will, as respects real estate situated in a State other than the one in which the decree was rendered because (1) the foreign Court has no jurisdiction or power to pass upon the title of the real estate not found within its territorial limits, and the constitutional provision presupposes a judgment or decree rendered by a Court of competent jurisdiction; and (2) the decree of probate has no effect even in that State upon the title to real estate elsewhere, and a constitutional provision does not require the giving of foreign judgments greater effect than they have at home." Numerous decisions can be cited in support of the foregoing proposition and for the purpose of the present case it seems sufficient to point out that the principles involved in above quotation were supported by the case of *Robertson* v. *Pickrell*, 109 U. S. 608, 27 L. Ed. 1049, 3 Sup.

Ct. 407, so that the issues have been passed on by the Supreme Court of the United States prior to this time and to further point out that both the Illinois Court and the Iowa Court in the present case have fully comprehended these principles it should be noted that the Appellate Court of the Second District *In re Estate of Mary E. Barrie, Deceased,* 311 Ill. App. 443, 447, 73 N. E. 2d 654 expressly limited the scope of the decisions as to the probate of the Will in the State of Illinois (R. 21). Therefore, since the Illinois Courts did not presume to have jurisdiction over the real estate in Iowa and did not presume to make any finding as to the validity of the Will in Iowa, it seems inconceivable that any question of full faith and credit could arise in regard to the Iowa Court's right to admit the Will in question to probate.

In regard to the appellant's citations in support of Section No. 2 of his brief, we have no argument with the general principles of full faith and credit as set down in the cases cited, however, as our argument has indicated they are not applicable to the present case. An examination of the citations in this Section of petitioner's brief discloses that they are in regard to factual situations far removed from the situation in this case and have no bearing on this case other than as general statements of principle.

We can do no better on this subject than to adopt by reference the appropriate portion of the opinion of the Iowa Supreme Court starting on page 34 of the printed record and ending at the top of page 37. The first paragraph is as follows:

> "Does a different rule pertain where instead of being admitted to probate in the domicile state, probate is denied? We think not. It is generally held that the full faith and credit provision of the Federal Constitution, Section 1, Article 4, does not render foreign decrees of probate conclusive as to the validity of a Will,

as respects real property situated in a State other than the one in which the decree was rendered, nor does the doctrine of *res adjudicata* or estoppel by judgment apply. *Robertson* v. *Pickrell*, 109 U. S. 608, 27 L. 3d 1049, 3 S. Ct. 407, where the Court said the probate established nothing beyond the validity of the Will in that State, and while conclusive there, the full faith and credit clause and the act of Congress enacted pursuant thereto, did not require that they shall have any greater force and efficacy in other courts than in the courts of the State from which they were taken, but *only such faith and credit as by law and usage they had there. Dibble* v. *Winter*, 247 Ill. 243, 93 N. E. 145; *Norris* v. *Loyd* (Iowa), *supra; M'Cormick* v. *Sullivant*, 10 Wheat. (U. S.) 192, 6 L. Ed. 300."

III.

The Doctrine of Res Judicata Has No Application to the Decision of the Supreme Court of Iowa in This Case.

It is obvious that as to findings of fact such as were made by the Supreme Court of Illinois in regard to whether or not Mary Barrie wrote upon her Last Will and Testament with intent to revoke the same, the decision of the Illinois Court is binding upon the Courts of Iowa and the facts so found between the parties are *res judicata*. This, however, has no bearing on the outcome of the present case because admitting the facts to be settled by a decision of the Supreme Court of Illinois, the decision of the Supreme Court of Iowa is perfectly consistent with such finding of fact.

It is also obvious that the decisions of law of the two Courts are entirely compatible. Our previous discussion of the principles involved in the giving of full faith and credit is also applicable to the question of *res judicata*.

It is a principle of law so well known as to negate the necessity of further discussion here that in order to be

res judicata the same exact issue must be involved in the prior suit as is involved in the second suit, and since it is obvious that the issue in the Court of Illinois was whether or not the Will of Mary Barrie had been revoked according to the Statutes of Illinois and the question involved in Iowa was whether or not the Will of Mary Barrie had been revoked in accordance with the Statutes of Iowa, there can be no possible application of *res judicata* in this case.

The Illinois Courts recognized their jurisdictional limitation over real property and decided only the question of whether the Will of Mary Barrie was entitled to probate as to personal property and her real estate located in the State of Illinois. Contrary to the petitioner's statement (Br. p. 17); the Courts of Illinois never decided that the instrument in question was not a Will or that Mary E. Barrie died intestate. The only issue decided by the Supreme Court of Illinois was that "The cause is remanded to the County Court with directions to enter an order refusing to admit the Will to probate" (R. 16). It is significant that the court even used the term "will". The Supreme Court of Iowa in the present case recognized the limitations on its jurisdiction and decided only the question of whether the Will of Mary Barrie was entitled to probate as to the real property located in Iowa. It would seem that this was in accord with the general principles laid down in the case of *Yonley* v. *Lavender* 21 Wall. 276, 22 U. S. S. Ct. Rep. Page 536, to the effect that the several States of the Union necessarily have full control over the estate of deceased persons within their respective limits.

It is therefore obvious that both the Iowa Court and the Illinois Courts have done nothing more than interpret their own probate Statutes as each has expressly recognized the other's right to do so. This, therefore, being a matter of statutory interpretation, the highest Courts of the State having spoken and no question of the constitutionality of

the Statute having been raised in this matter, it does not seem that the Supreme Court of the United States should interfere with the decisions below. *Sioux City Terminal Railroad and Warehouse Co.* v. *Trust Company of North America,* 173 U. S. 99, 19 Sup. Ct. 341, 43 L. Ed. 628.

In this regard it should be noted that the split in the Iowa Court's opinion below was predicated upon the interpretation of the Iowa Statute and not upon the common law or any constitutional questions involved. Notice dissenting opinion (R. 43), second paragraph and again on (R. 46) where discussion by the minority of the Iowa Court indicates they recognized the common law but felt their statute had changed it. The minority opinion distinguished the Florida and other cases because "they refer to no such statutory provision as ours" (R. 43). The majority opinion emphasized that the Iowa legislature could have included a provision in the Code to cover this situation but failed to do so (R. 37). The minority opinion in attempting to include a provision by implication stated (R. 44) that such omission of the Iowa legislature was "unthinkable". But the Iowa legislature was wise to avoid adopting the archaic rule of Illinois as to revocation, as applicable to land in Iowa. Its own rule as to revocation is practical and sensible.

IV.

The Federal Questions Which Petitioner Attempts to Raise in His Brief Have All Been Previously Adjudicated by the Supreme Court of the United States.

A close analysis of the case of *Robertson* v. *Pickrel,* 109 U. S. 208, 27 L. Ed. 1049, 3 Sup. Ct. 407 indicates that each Federal question raised by petitioner in his brief has been heretofore completely considered and decided upon by the Supreme Court of the United States, and that the decision

of the Supreme Court of the State of Iowa in the present case was in accordance with such Supreme Court decisions.

Conclusion.

After consideration of the numerous quotations and their application or lack of application to the points involved, we must come back to the fact that the document in question was in the first instance a Will. Then did it ever cease to be a Will? The Illinois Supreme Court held that because of the acts of the testator the document became revoked as to property in Illinois and so denied it to probate. This decision controlled all of the personal property of the decedent wherever located and the real estate in Illinois. It did not have any further effect whatever. The document still existed in the form in which it was originally executed, although there were later placed upon it certain writings and markings. The Illinois Supreme Court continued to refer to it as a "Will" in its ruling.

This document was then offered for probate in the State of Iowa. The Iowa Court had before it the question of whether it was a valid and subsisting Will to effect real estate in Iowa. The Iowa Statute permits the presentation of the Will of a deceased testator of other States provided the testator owned real estate in Iowa at the time of his death. The Iowa Court then had before it the question of whether the Will had been revoked in accordance with any provision of the Iowa Code. It held it had not been so revoked and so was effective in Iowa.

The Iowa Court then had to consider whether the judgment in Illinois was *res judicata* but was quickly able to dispose of this question because the decree in Illinois did not pass upon the question as to whether the Will was still a valid Will in Iowa even though according to the Statute of Illinois it had been revoked.

The Iowa Court then gave due consideration to the question of whether its obligation to give full faith and credit to the decision of the Illinois Supreme Court constrained it to hold that the Will could not be used to pass title to real estate in the State of Iowa. It found not only that the Illinois Supreme Court made no such decision on this question and confined itself to the effect of the document in Illinois, but also learned that the Appellate Court for the Second District of Illinois which was the Court of last resort on the type of question before it, held in effect that it would indeed be proper to present the Will for probate in the State of Iowa. While this decision did not go so far as to require the District Court of Iowa to admit the Will to probate, and such a holding would have been beyond the jurisdiction of the Illinois Court, it was a decision by an Illinois Court by which it would appear that the District Court of Iowa was free to consider whether under the laws of Iowa, the Will had been revoked. It showed the effect given to the Illinois decision by the law of Illinois. Another state could give it no stronger effect.

Up to this point, there was apparently no disagreement in the Supreme Court of the State of Iowa. The majority opinion held that the Will could not be revoked under the Iowa Code in the manner in which it was held to have been revoked under the Illinois Code. The minority opinion attempted to construe the Iowa Statute by reading into it an alleged intention of the Iowa Legislature to adopt the methods of revocation in force in the States of domicile of decedents. The members of the Court were unable to agree upon the proper construction of the Iowa Code but the majority has spoken in its opinion. As the majority opinion was that the Will was not revoked according to the law of Iowa, and that the Illinois Courts had no jurisdiction of and did not attempt to pass upon the question as to whether the Will had been revoked by the law of Iowa, it applied its

construction of the law of Iowa to the application to probate the Barrie Will just as it would any other Will of a non-resident dying with a title to real estate in Iowa in the same manner as if the Will had never been denied probate in the State of domicile of the testator and ordered that the Will be admitted to probate.

To review this decision of the Court of last resort of the State of Iowa would be to depart from all precedents of this Court with the effect of unforeseeable confusion in the future both as regards the Full Faith and Credit Clause of the Constitution of the United States and the construction of State Statutes.

Respectfully submitted,

CARL E. SHELDON,
PHILIP H. WARD,
Sterling, Illinois,
WILLARD F. RUSSELL,
Toledo, Iowa,
Counsel for Respondent.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1948

No. 811

THOMAS HODGE, GEORGE HODGE, NETTIE POWELL, ANNA LEASE and AGNES CRIPPEN,
Petitioners.

vs.

FIRST PRESBYTERIAN CHURCH OF STERLING, ILLINOIS
Respondent.

PETITION FOR REHEARING

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Now come Petitioners, Thomas Hodge, George Hodge, Nettie Powell, Anna Lease and Agnes Crippen, by J. J. Ludens, their attorney, and ask the Court to grant a rehearing in the above entitled cause in which a petition for certiorari was denied on October 10, 1949, and for grounds not previously urged, set forth the following:

1. This decision would nullify and set aside the established law that the domicile controls as to whether a person died testate or intestate.

2. That this decision is contrary to the established decisions of this Court that full faith and credit must be given to the judicial proceedings and judgments of other courts.

3. That it nullifies the constitutional provision of giving full faith and credit to the judgments of another state.

We sincerely believe that the Court should have granted the petition for certiorari in this case and that it was a proper case to be heard in the Supreme Court of the United States on certiorari from the Supreme Court of Iowa.

Our petition was based upon the proposition that the Illinois court rendered a judgment stating that Mary E. Barrie, who was a resident of and domiciled in the State of Illinois, died intestate. That judgment is in full force and effect and under the Constitution of the United States is entitled to full faith and credit in every other state in the Union.

Under the doctrine of res judicata, this matter was adjudicated between the same parties in the courts of Illinois with the result that the Illinois courts held that the testator died intestate. The fact that the Iowa laws in regard to revocation of wills might be different from the Illinois laws does not alter the matter. That question was decided by this court in the case of *Fauntleroy* vs. *Lum*, 210 U. S. 230.

We cannot help but feel that in denying this petition the court overlooked the fact that the judgment in Illinois is conclusive in every other state in the Union. It is conclusive between the parties in Iowa as well

as in Illinois and if that is the case, how can this Iowa judgment stand and overrule the judgment of the Supreme Court of Illinois. If it does, then it is in direct violation of the constitutional provisions of full faith and credit.

It has been laid down by this Court by Chief Justice Marshall that the judgment of a state court shall have the same credit, validity and effect in every other court in the United States which it had in the state where it was pronounced and that whatever pleas that would be good to a suit thereon in such state and none others could be plead in any other court in the United States. (*Hampton* vs. *O'Connell*, 3 Wheat. 234).

Under the full faith and credit clause of the Constitution, a defendant may not a second time challenge the validity of plaintiff's right which has ripened into a judgment, and the plaintiff may not, for his single cause of action secure a second or a greater recovery. (*Magnolia Petroleum Company* vs. *Hunt*, 320 U. S. 430).

This certainly makes it too plain for any question that a judgment rendered in any court is conclusive upon the parties and all litigation between the parties in any other state and we are at a loss to see why this judgment of the Court of Illinois stating that the testator died intestate is not a final and conclusive judgment in the State of Iowa, notwithstanding the fact that the land lies in the State of Iowa. We feel that this matter was not sufficiently presented in our petition for certiorari and we are therefore asking the Court for rehearing so that the matter may be duly presented for hearing.

This petition is presented in good faith and with the sincere belief of counsel that the Iowa decision is wrong and that if allowed to stand, it will be in violation of the full faith and credit clause of the Constitution of the United States, and is not presented for delay but that justice may be done. Our petition is restricted to the grounds above specified.

All of which is respectfully submitted.

J. J. LUDENS,
Counsel for Petitioners.